

2003

# Brittany Briner Hughes v. Ediet.com, Inc. : Brief of Appellant

Utah Court of Appeals

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BRITTANY BRINER HUGHES,	:		No. 20030946-SC
	:		Civil No. 020413641
Plaintiffs/Appellants,	:		
	:		
vs.	:		
	:		
EDIET.COM, INC. and JOHN DOES	:		PRIORITY NO.: 15
one through ten whose true names are	:		
unknown.	:		
	:		
Defendants/Appellees.	:		
	:		

20030945-CIA

No. 20030946-SC  
Civil No. 020413641

PRIORITY NO.: 15

Appeal from the Order of the Third District Court,  
Salt Lake County, Sandy Division, The Honorable Judge Michael Burton

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**FILED**

# STATE APPELLATE COURTS

APR - 1 2004

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IN THE UTAH COURT OF APPEALS

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BRITTANY BRINER HUGHES,

Plaintiffs/Appellants,

vs.

EDIET.COM, INC. and JOHN DOES  
one through ten whose true names are  
unknown.

Defendants/Appellees.

No. 20030946-SC  
Civil No. 020413641

PRIORITY NO.: 15

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APPELLANTS' OPENING BRIEF ON APPEAL

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Appeal from the Order of the Third District Court,  
Salt Lake County, Sandy Division. The Honorable Judge Michael Burton

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## **APPELLANT’S BRIEF**

Appellant. Brittney Briner Hughes submits this brief in the appeal before this Court.

### **LIST OF ALL PARTIES TO THE PROCEEDING BELOW**

The Plaintiff-Appellant:

Brittany Briner Hughes, on behalf of herself and all others similarly situated.

The Defendant-Appellee:

Ediets.com, Inc., and John Does one through ten whose true names are unknown (“Ediets.com”).

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## JURISDICTION OF APPELLATE COURT

The jurisdiction of all appellate courts “shall be provided by statute.”<sup>1</sup> Section 78-2-2(3)(j) of the Utah Code, provides that: “The Supreme Court has appellate jurisdiction ..., over orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction[.]”<sup>2</sup> This is an appeal from the final judgment of the Third District Court in a civil matter, and although it has original appellate jurisdiction, the Supreme Court has transferred this matter to the Court of Appeals pursuant to § 78-2-2(4) and § 78-2a-3(2)(j), which statutes provide that the Supreme Court may transfer any matter over which it has original appellate jurisdiction.

## ISSUES PRESENTED FOR REVIEW

1. Whether the award of attorney fees under Utah’s Anti-SPAM Statute which was reduced to a fraction of what was incurred was an abuse of discretion of the lower court?
2. Whether Plaintiff’s rights to due process were violated by the lower court’s decision to award attorney fees based upon the decision of another case, without hearing, and without submission of an affidavit of attorney fees?

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<sup>1</sup> Utah Const., Article VIII, § 5.

<sup>2</sup> Ut. Code Ann., § 78-2-2(3)(j) (1953, as amended).

## STANDARD OF REVIEW

This Court should review the legal conclusions of the trial court for correctness. “Generally, we review a trial court’s legal conclusions for correctness, according the trial court no particular deference.” *Wilson Supply, Inc. v. Fradan Mfg. Corp.*, 2002 UT 94, P 11, 54 P.3d 1177, 1181 (quoting *Orton v. Carter*, 970 P.2d 1254, 1256 (Utah 1998)).

This Court should review the decision and award of attorney fees by the lower court for an abuse of discretion. *Turtle Management, Inc. v. Haggis Management, Inc.*, 645 P.2d 667, 671 (Utah 1982).

This Court should review the statutory interpretations of the Third District Court for correctness. “We review the district court’s statutory interpretations for correctness.” *Davis County Solid Waste Mgmt. v. City of Bountiful*, 2002 UT 60, P 9, 52 P.3d 1174. “We look first to the statute’s plain language as evidence of the legislature’s intent, and give effect to that plain language unless the statute is ambiguous.” *Id.* at P 10. “We analyze the language of a statutory provision in light of other provisions within the same statute or act, and we attempt to harmonize the provisions in accordance with the legislative intent so as to give meaning to each provision.” *Id.*

## APPLICABLE RULES AND REGULATIONS TO APPEAL

Rule 4-505(1) Utah Rules of Judicial Administration.

Rule 4-505.1 Utah Rules of Judicial Administration

## STATEMENT OF THE CASE

### **Nature of the Case:**

This case involves the sending of unsolicited commercial email by Ediets.com, Inc. (Defendant/Appellee/Ediets.com) to Brittany Briner Hughes (Plaintiff/Appellant/Hughes), for which she brought an action in accordance with the Unsolicited Commercial and Sexually Explicit Email Act found in Utah Code Annotated §§ 13-36-101 to 13-36-105 (2002) (the "Statute"). This is a case of first impression.

### **Course of Proceedings and Disposition Below:**

Hughes filed her action in the Third District Court, Sandy Division on September 5, 2002 alleging that Ediets.com sent or caused to be sent to Hughes an unsolicited commercial email in violation of the Statute. *See* Hughes Court Record (Ct. Rec.) p. 1-9. On February 27, 2003, Defendant filed its answer. Ct. Rec. p. 10-14. On September 24, 2003, Ediets.com filed a Confession of Judgment and Motion for Hearing to Determine Reasonable Attorneys' Fees to Be Awarded Therein. *See* Ct. Rec. p. 68-72.

On October 14, 2003, Judge Burton without hearing, and without submission of an affidavit of attorney fees, filed a decision on the determination of attorneys' fees. *See* Ct. Rec. p. 73-75. Judge Burton made an award of \$885.00 for attorney fees reducing the attorney fees earned from \$2,600.00. *See* Ct. Rec. p. 73-75.

Plaintiff filed her Notice of Appeal November 14, 2003 (Ct. Rec. pp. 77) with the Utah Supreme Court which subsequently transferred this matter to this Court on January 14, 2004 (Ct. Rec. p. 78).

**Facts Established in the Record Below:**

1. On May 9, 2002 Brittany Briner Hughes received an unsolicited commercial email. See Ct. Rec. p. 4.
2. The email sent by Ediets.com solicited products sold for the benefit of Ediets.com, Inc. See Ct. Rec. p. 4-9.
3. On September 24, 2003, Ediets.com, Inc. filed a Confession of Judgment and Motion for Hearing to Determine Reasonable Attorneys' Fees to be Awarded Therein. See Ct. Rec. p. 68-72.
4. On October 14, 2003, before an affidavit had been filed on attorney's fees by the prevailing party, Honorable Judge Michael Burton of the Sandy Department of the Third District Court, based upon no affidavit or submission to the court, filed a decision awarding attorneys fees in the amount of \$885.00. See Ct. Rec. p. 73-75.

**SUMMARY OF ARGUMENTS**

1. The Utah Unsolicited Commercially and Sexually Explicit Email Act ("Spam Act") provides for the award of a reasonable attorney fee for violations of that act. In this

case. Defendants confessed judgment, entitling Plaintiff to an award of attorneys fees. No evidence of what the attorneys fees that were earned was ever considered. Without any such submission, without hearing, or without any other evidence, the lower court issued a decision awarding attorneys fees in an amount that was significantly less than the fees that were incurred. This was an abuse of discretion and a violation of Plaintiff's due process rights.

## ARGUMENT

### **Although the Award of Attorney Fees Was Proper, it Was Made Without the Proper Consideration or Evidence.**

Plaintiff brought an action against Defendant for the violation of Section 13-36-101, *et seq.*, of the Utah Code, which is more commonly known as the Utah Unsolicited Commercial and Sexually Explicit Email Act (the "Spam Act"). Utah Code Ann. § 13-36-101, *et seq.* The Spam Act provides that "each prevailing recipient or email service provider shall be awarded costs and reasonable attorney fees." Utah Code Ann. § 13-36-105(2)(b) (2002). In this case, Defendant filed a Confession of Judgment, admitting to violating the act, thereby acknowledging its duty to pay costs and a reasonable attorney fee.

"Attorney fees are generally recoverable in Utah only when authorized by statute or contract." *Prince v. Bear River Mut. Ins. Co.*, 2002 UT 68, ¶ 52, 56 P.3d 524 (Utah 2002).

When attorney fees are recoverable, the calculation of reasonable attorney fees is in the sound discretion of the trial court. *Jenkins v. Bailey*, 676 P.2d 391, 393 (Utah 1984). In this case, an award of attorney fees is provided by statute, and should be made in favor of

a prevailing recipient, which Plaintiff was, therefore the award of attorney fees was proper. The amount of the award, however took no evidence or affidavit into consideration when making it's award. That was an abuse of discretion.

The Rules of Judicial Administration give some guidance as to the requirements to determine attorney fees. Rule 4-505 of the Utah Rules of Judicial Administration provides in pertinent part:

"Affidavits in support of an award of attorney fees **must** be filed with the court and set forth specifically the legal basis for the award, the nature of the work performed by the attorney, the number of hours spent to prosecute the claim to judgment, or the time spent in pursuing the matter to the stage for which attorney fees are claimed, and affirm the reasonableness of the fees for comparable legal services."

Rule 4-505(1) Utah Rules of Judicial Administration (emphasis added).

In this case, Defendant's Confession of Judgment and Motion for Hearing to Determine Reasonable Attorneys' Fees to Be Awarded Therein, expressly requested that Plaintiff be required "to submit an affidavit setting forth the reasonable amount of attorneys' fees and costs incurred in this matter[.]" See Ct. Rec. p.69. "The purpose of the requirement that an affidavit in support of an award of attorney fees state the legal basis for the award is to inform the court and opposing counsel of the ground relied upon because fees are not routinely awarded in every case and can be awarded only on certain narrow grounds." *Hall V. NACM Intermountain, Inc.*, 1999 UT 97, 988 P.2d 942 (Utah 1999). Notwithstanding the requirement of Rule 4-505(1) nor the Defendant's request, Plaintiff was never even

given an opportunity to submit the proper affidavits before the lower court made its award and ruling. This was an error by the lower court.

The lower court based its decision on the decision Judge Burton had previously made in *Amyx v. Columbia House Holdings*, which carries a civil number of 020413332, and was previously filed in the Sandy Department of the Third District Court. A copy of that decision is attached in the Addendum hereto as Addendum 3. Although that case was also an action for violation of the Utah Spam Act, it was and remains a different case with different parties and different circumstances. Nevertheless, in his Decision, Judge Burton states that “[t]he question of what is a reasonable attorney’s fee in this type of case was the focus of a hearing held before me on 15 September 2003 in the matter of *Amyx v. Columbia House Holdings*, which carries the civil number 020413332 here in the Sandy Department.” See Ct. Rec. p. 73. The problem with that statement is that the hearing referred to was not to determine a reasonable fee for that **type** of case, rather it was to determine a reasonable fee for that **particular** case. It was error to make that assumption. Judge Burton had no mechanism to weigh the *Dixie v. Bracken* factors, no evidence to support his conclusions, nor was any effort made to even obtain such evidence. See *Dixie State Bank v. Bracken*, 764 P.2d 985 (Utah 1988).

Nowhere in the Spam Act does it provide for a “uniform fee” to be awarded for the violation of that act. Where a uniform fee has been established, that fee schedule has been established by the appropriate governmental body. See e.g. Rule 4-505.1 Utah Rules of

Judicial Administration (setting fee schedule for attorneys in default judgment). The language of the Spam Act only provides that costs and a reasonable attorney fee should be awarded to the prevailing recipient of a violating email. Nevertheless, that is what the lower court did. It simply awarded the fees it had awarded in another case, despite the lack of affidavit evidence and contrary to the requirements of the rules.

The lower court also made inference that the amount of the fee should be reduced, or determined based upon the statutory recovery amount of \$10.00. That also was in error.

“In addition, although the amount in controversy can be a factor in determining a reasonable fee, care should be used in putting much reliance on this factor. It is a simple fact in a lawyer's life that it takes about the same amount of time to collect a note in the amount of \$1,000 as it takes to collect a note for \$100,000. As stated in *Cabrera*: The total amount of the attorneys fees awarded in this case cannot be said to be unreasonable just because it is greater than the amount recovered on the contract. The amount of the damages awarded in a case does not place a necessary limit on the amount of attorneys fees that can be awarded.”

*Dixie* at 990 (citing *Cabrera v. Cottrell*, 694 P.2d 622, 625 (Utah 1983)). Nevertheless, the lower court did just that.

**2. Making the Award Without Notice or Hearing or Opportunity to Submit Affidavit, Violated Plaintiff's Rights of Due Process.**

In this case, decision of the amount of attorney fees was made without notice or opportunity to be heard. Although Defendants had submitted their Motion for Determination of Reasonable Attorney Fees, and requested that Plaintiffs be ordered to submit affidavits in support of their attorney fees, no such opportunity was ever granted. The lower court relied upon *Amyx v. Columbia House Holdings, Inc.* as previously



mentioned above. In that case, a similar motion was presented to the court, but instead of the court making it's own determination, a minute entry was made and sent to all parties ordering Plaintiff's counsel to submit the appropriate affidavits. See copy of Docket attached as Addendum 4. The decision in that case was made on October 14, 2003 one full month after the hearing. See Addendum 4. That was the same date on which the award was made in this case, even though Plaintiff's motion was filed only twenty days prior. See Ct. Rec. p. 73.

As the lower court relied upon the precedent set by *Amyx*, Plaintiff should also be allowed to rely upon the precedent set by Judge Lindberg in that case when she sent out her Minute Entry requiring the attorney affidavits be submitted. There was never any opportunity to hearing, there was never any minute entry, there was never any opportunity to submit affidavit. The court had no way to determine if the number of hours were the same in that case as they were in *Amyx*, or if they were greater or even smaller. Due process requires that Plaintiff be given the opportunity to be heard at least in some way. That might have been satisfied even through the ability to submit the affidavits, but it was not.

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Kowalczyk v. INS*, 245 F.3d 1143, 1147 (10th Cir. 2001) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)); *Jones v. Nuclear Pharm., Inc.*, 741 F.2d 322, 325 (10th Cir. 1984) ("The essence of procedural due process is that the parties be given notice and opportunity for a hearing."). "The universal rule of

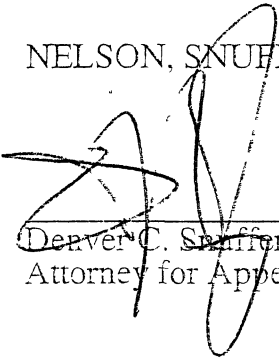
due process is fairness[.]” *Jones*. 741 F.2d at 325. Here there was nothing fair about it. It was simply a unilateral decision not based upon the merits or any sort of evidence. It was error and the decision should be remanded for careful consideration of the attorney fees actually earned in that case.

### CONCLUSION

Pursuant to the foregoing arguments and law, Appellant respectfully requests this Court remand this case back to the lower court for a proper review of the attorney fees.

DATED this 1 day of April, 2004.

NELSON, SNUFFER, DAHLE & POULSEN



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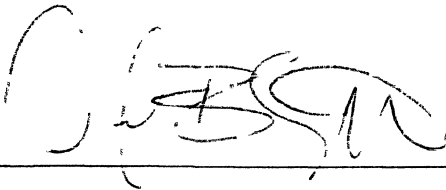
Denver C. Snuffer, Jr.  
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I served two true and correct copies of the foregoing  
**APPELLANTS' OPENING BRIEF ON APPEAL**, via first class mail, postage prepaid,  
on the following.

John A. Adams (#0023)  
N. Aaron Murdock (#8767)  
RAY, QUINNEY & NEBEKER  
36 South State Street, Suite 1400  
Salt Lake City, UT 84111

on this 1 day of April, 2004

  
\_\_\_\_\_

## ADDENDUM

1. Decision.
2. Utah Code Ann. §§ 13-36-101-105, The Utah Unsolicited Commercial and Sexually Explicit Email Act.
3. Decision. Amyx v. Columbia House Holding, Inc.. Third District Court Case. Sandy Department. Case Number 020413332.
4. Docket. Amyx v. Columbia House Holding, Inc.. Third District Court Case. Sandy Department. Case Number 020413332

## ADDENDUM I

THIRD DISTRICT COURT, SANDY DEPARTMENT

SALT LAKE COUNTY, STATE OF UTAH

FILED  
THIRD DISTRICT COURT  
SANDY DEPT.

OCT 14 2003

Brittany Briner Hughes,

Plaintiff,

DECISION

v.

Civil No. 020409590

EDIETS.COM, Inc. and,  
and others,  
Defendants.

Judge Burton

This matter is before me to determine a reasonable attorney's fee to be awarded to the Plaintiff pursuant to the Defendant EDIETS.COM previously submitted Confession of Judgment. The Defendant seeks a hearing to establish the amount of the reasonable attorney's fee that must be awarded to Plaintiff pursuant to the governing statute.

There is no need for a hearing on this issue.

The question of what is a reasonable attorney's fee in this type of case was the focus of a hearing held before me on 15 September 2003 in the matter of Amyx v. Columbia House Holdings, which carries the civil number 020413332 here in the Sandy Department. During the hearing and based upon the pleadings submitted by the parties, I was presented sufficient information that I reached the "Conclusion of Law" noted below. I am quite certain that another hearing, again involving the recovery by Plaintiff of \$10.00 in damages, would not increase my knowledge of what constitutes a reasonable attorney's fee and would not change my decision. As such, I reach the "Conclusion of Law" set forth below for the reasons previously stated in Amyx.

CONCLUSION of LAW


Having found that the Plaintiff's attorney should have spent 3.25 hours at the rate of \$150.00 per hour to successfully prosecute this action; and


Having found that the Plaintiff's paralegal spent 4.5 hours at the rate of \$85.00 per hour to successfully prosecute this action;

I would conclude that Plaintiff is entitled to an award of \$885.00 as a reasonable attorney's fee in this case.

The Plaintiff should now prepare for my signature such order or judgment as he thinks will best effectuate this Decision.

DATED 14 October 2003.

  
\_\_\_\_\_  
Judge, Third District Court

The seal is circular with a double-lined border. The outer ring contains the text "THIRD DISTRICT COURT" at the top and "STATE OF UTAH" at the bottom. The center of the seal features a stylized sunburst or starburst design.

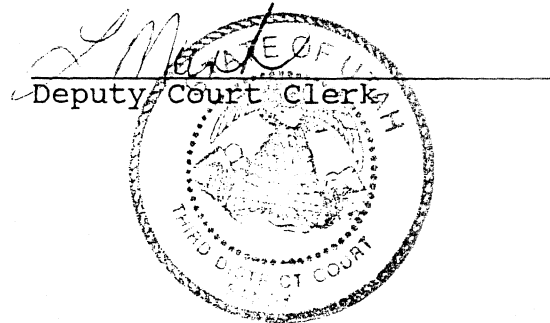
CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 020409590 by the method and on the date specified.

METHOD NAME

Mail JOHN A ADAMS  
ATTORNEY DEF  
36 S STATE ST #1400  
PO BOX 45385  
SALT LAKE CITY, UT  
84145-0385  
Mail DENVER C SNUFFER  
ATTORNEY PLA  
10885 SOUTH STATE STREET  
SANDY UT 84047

Dated this 15 day of Oct, 2003.





ADDENDUM 2

(5) whether the franchisees of the same line-make in that relevant market area are providing adequate service to consumers for the powersport vehicles of the line-make which shall include the adequacy of the powersport vehicle sale and service facilities, equipment, supply of vehicle parts and qualified service personnel 2002

### 13-35-307. Franchisor's repurchase obligations upon termination or noncontinuation of franchise.

(1) Upon the termination or noncontinuation of a franchise by the franchisor the franchisor shall pay the franchisee

(a) the franchisee's cost of new undamaged, and unsold powersport vehicles in the franchisee's inventory acquired from the franchisor or another franchisee of the same line-make representing both the current model year at the time of termination or noncontinuation and the immediately prior model year vehicles

(i) plus any charges made by the franchisor for distribution, delivery, or taxes.

(ii) plus the franchisee's cost of any accessories added on the vehicle shall be repurchased, and

(iii) less all allowances paid or credited to the franchisee by the franchisor

(b) the cost of all new, undamaged, and unsold supplies, parts, and accessories as set forth in the franchisor's catalog at the time of termination or noncontinuation for the supplies, parts, and accessories, less all allowances paid or credited to the franchisee by the franchisor,

(c) the fair market value, but not less than the franchisee's depreciated acquisition cost of each undamaged sign owned by the franchisee that bears a common name, trade name, or trademark of the franchisor if acquisition or the sign was recommended or required by the franchisor. If a franchisee has a sign with multiple manufacturers listed, the franchisor is only responsible for its pro rata portion of the sign

(d) the fair market value, but not less than the franchisee's depreciated acquisition cost of all special tools, equipment, and furnishings acquired from the franchisor or sources approved by the franchisor that were recommended or required by the franchisor and are in good and usable condition, and

(e) the cost of transporting, handling, packing, and loading powersport vehicles, supplies, parts, accessories, signs, special tools, equipment, and furnishings

(2) The franchisor shall pay the franchisee the amounts specified in Subsection (1) within 90 days after the tender of the property to the franchisor if the franchisee

(a) has clear title to the property, and

(b) is in a position to convey title to the franchisor

(3) If repurchased inventory and equipment are subject to a security interest, the franchisor may make payment jointly to the franchisee and to the holder of the security interest 2002

## CHAPTER 36

### UNSOLICITED COMMERCIAL AND SEXUALLY EXPLICIT EMAIL ACT

Section	Title
13-36-101	Title
13-36-102	Definitions
13-36-103	Unsolicited commercial or sexually explicit email — Requirements
13-36-104	Criminal penalty
13-36-105	Civil action for violation — Election on damages — Costs and attorney fees — Defense.

#### 13-36-101. Title.

This chapter is known as the Unsolicited Commercial and Sexually Explicit Email Act 2002

#### 13-36-102. Definitions

As used in this chapter

(1) "Commercial" means for the purpose of promoting the sale, lease, or exchange of goods, services, or real property

(2) "Computer network" means two or more computers that are interconnected to exchange electronic messages, files, data, or other information

(3) "Email" means an electronic message, file, data, or other information that is transmitted

(a) between two or more computers, computer networks, or electronic terminals, or

(b) within a computer network

(4) "Email address" means a destination, commonly expressed as a string of characters, to which email may be sent or delivered

(5) "Email service provider" means a person that

(a) is an intermediary in the transmission of email from the sender to the recipient, or

(b) provides to end users of email service the ability to send and receive email

(6) "Internet domain name" means a globally unique hierarchical reference to an Internet host or service, assigned through centralized Internet authorities comprising a series of character strings separated by periods, with the right-most string specifying the top of the hierarchy

(7) (a) "Sexually explicit email" means an email that contains, promotes, or contains an electronic link to material that is harmful to minors as defined in Section 76-10-1201

(b) An email is a "sexually explicit email" if it meets the definition in Subsection (7)(a), even if the email also meets the definition of a commercial email

(8) (a) "Unsolicited" means without the recipient's express permission, except as provided in Subsection (8)(b)

(b) A commercial email is not "unsolicited" if the sender has a preexisting business or personal relationship with the recipient 2002

#### 13-36-103. Unsolicited commercial or sexually explicit email — Requirements.

(1) Each person who sends or causes to be sent an unsolicited commercial email or an unsolicited sexually explicit email through the intermediary of an email service provider located in the state or to an email address held by a resident of the state shall

(a) conspicuously state in the email the sender's

(i) legal name,

(ii) correct street address, and

(iii) valid Internet domain name

(b) include in the email a subject line that contains

(i) for a commercial email, "ADV" as the first four characters, or

(ii) for a sexually explicit email, "ADV ADULT" as the first nine characters

(c) provide the recipient a convenient, no-cost mechanism to notify the sender not to send any future email to the recipient, including

(i) return email to a valid functioning return electronic address, and

(ii) for a sexually explicit email and if the sender has a toll-free telephone number, the sender's toll-free telephone number, and

(d) conspicuously provide in the text of the email a notice that

(i) informs the recipient that the recipient may conveniently and at no cost be excluded from future

commercial or sexually explicit email, as the case may be, from the sender, and

(u) for a sexually explicit email and if the sender has a toll-free telephone number includes the sender's valid, toll-free telephone number that the recipient may call to be excluded from future email from the sender

(2) A person who sends or causes to be sent an unsolicited commercial email or an unsolicited sexually explicit email through the intermediary of an email service provider located in the state or to an email address held by a resident of the state may not

(a) use a third party's Internet domain name in identifying the point of origin or in stating the transmission path of the email without the third party's consent,

(b) misrepresent any information in identifying the point of origin or the transmission path of the email or

(c) fail to include in the email the information necessary to identify the point of origin of the email

(3) If the recipient of an unsolicited commercial email or an unsolicited sexually explicit email notifies the sender that the recipient does not want to receive future commercial email or future sexually explicit email, respectively, from the sender the sender may not send that recipient a commercial email or a sexually explicit email, as the case may be, either directly or through a subsidiary or affiliate. 2002

#### 13-36-104. Criminal penalty

(1) A person who violates any requirement of Section 13-36-103 with respect to an unsolicited sexually explicit email is guilty of a class B misdemeanor

(2) A criminal conviction or a penalty assessed as a result of a criminal conviction under Subsection (1) does not relieve the person convicted or assessed from civil liability in an action under Section 13-36-105. 2002

#### 13-36-105. Civil action for violation — Election on damages — Costs and attorney fees — Defense.

(1) For any violation of a provision of Section 13-36-103, an action may be brought by

(a) a person who received the unsolicited commercial email or unsolicited sexually explicit email with respect to which the violation under Section 13-36-103 occurred or

(b) an email service provider through whose facilities the unsolicited commercial email or unsolicited sexually explicit email was transmitted

(2) In each action under Subsection (1)

(a) a recipient or email service provider may

(i) recover actual damages, or

(ii) elect in lieu of actual damages to recover the lesser of

(A) \$10 per unsolicited commercial email or unsolicited sexually explicit email received by the recipient or transmitted through the email service provider, or

(B) \$25,000 per day that the violation occurred, and

(b) each prevailing recipient or email service provider shall be awarded costs and reasonable attorney fees

(3) An email service provider does not violate Section 13-36-103 solely by being an intermediary between the sender and recipient in the transmission of an email that violates that section

(4) The violation of Section 13-36-103 by an employee does not subject the employee's employer to liability under that section if the employee's violation of Section 13-36-103 is also a violation of an established policy of the employer that requires compliance with the requirements of Section 13-36-103

5) It is a defense to an action brought under this section that the unsolicited commercial email or unsolicited sexually explicit email was transmitted accidentally. 2002

## CHAPTER 37

### NOTICE OF INTENT TO SELL NONPUBLIC PERSONAL INFORMATION ACT [EFFECTIVE JANUARY 1, 2004]

#### Part 1

#### General Provisions [Effective January 1, 2004]

##### Section

13-37-101 Title [Effective January 1, 2004]

13-37-102 Definitions [Effective January 1, 2004]

#### Part 2

#### Notice of Disclosure [Effective January 1, 2004]

13-37-201 Required notice [Effective January 1, 2004]

13-37-202 Disclosure of nonpublic personal information prohibited without notice [Effective January 1, 2004]

13-37-203 Liability [Effective January 1, 2004]

## PART 1

### GENERAL PROVISIONS [EFFECTIVE JANUARY 1, 2004]

#### 13-37-101. Title [Effective January 1, 2004].

This chapter is known as the "Notice of Intent to Sell Nonpublic Personal Information Act". 2003

#### 13-37-102. Definitions [Effective January 1, 2004]

As used in this chapter

(1) "Affiliate" means a person that controls or is controlled by, or is under common control with

(a) a commercial entity and

(b) (i) directly or

(ii) indirectly through one or more intermediaries

(2) (a) Subject to Subsection (2)(b), commercial entity means a person that

(i) has an office or other place of business located in the state, and

(ii) in the ordinary course of business transacts a consumer transaction in this state

(b) "Commercial entity" does not include

(i) a governmental entity or

(ii) an entity providing services on behalf of a governmental entity

(3) "Compensation" means anything of economic value that is paid or transferred to a commercial entity for or in direct consideration of the disclosure of nonpublic personal information.

(4) (a) "Consumer transaction" means

(i) a sale, lease, assignment, award by chance, or other written or oral transfer or disposition

(A) that is initiated or completed in this state, and

(B) or

(I) goods

(II) services or

(III) other tangible or intangible property, except securities and insurance or services related thereto or

ADDENDUM

COPY FILED  
THIRD DISTRICT COURT  
SANDY DEPT.  
OCT 14 2003

THIRD DISTRICT COURT, SANDY DEPARTMENT

SALT LAKE COUNTY, STATE OF UTAH

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Frank Amyx,

Plaintiff,

v.

Columbia House Holdings, Inc.,  
and others,  
Defendants.

DECISION

Civil No. 020413332

Judge Burton

---

This matter is before me to determine a reasonable attorney's fee to be awarded to the Plaintiff pursuant to the Defendant Columbia House Holdings previously approved Confession of Judgment. Each party has fully briefed the matter and was able to share with me their respective positions at a hearing on 15 September 2003.

The question of what is a reasonable attorney's fee has been the focus of quite a bit of the effort of these attorneys. I can't recall a time when I have seen such disparate positions taken by lawyers as they discuss what value should be placed on their work product. The Plaintiff's first volley was a simple five page affidavit which fixed the reasonable attorney's fee at about \$2,600.00 for the obtaining of a \$10.00 result. The Defendant replied with objections covering eleven pages, their own affidavit, a few exhibits and the assertion that a reasonable attorney's fee for obtaining a \$10.00 award was \$150.00. Not wanting to be unclear on the differences they had with the position presented by the Defendant, the Plaintiff prepared a modest reply to objections that covered just eight pages, but supplemented that with enough exhibits and additional claims that the packet of pleadings weighed more than a pound and a half and increased the claimed amount of attorney's and paralegal fees to a little over \$4,000.00. So, the finder of fact was left to decide which was more reasonable, \$4,000.00 or \$150.00. The gap between the two positions is enormous, all with respect to a recovery of \$10.00.

FACTUAL DIFFICULTIES

Each party has presented me with factual problems that simply fail to stand up to the most basic scrutiny.

The Plaintiff asserts that:

[1] 1.5 hours was devoted to "spam research". That is a problem because there have been at least 700, and perhaps as many as 1200, cases of this exact type filed by the Plaintiff. If there were only 700 similar cases, an hour and half attributed to this case for spam research seems to mean that a total of 1050 hours were spent doing research for all 700 of these cases. That equates to just over 130 eight hour days or about four and three-eighths months of research. If there were 1200 such cases filed, the effort then consumed 225 days or seven and one-half months. I don't believe that happened.

[2] 1.6 hours were spent in client meetings. The Plaintiff touts this as being "...very concise and itemized." The necessity of this amount of time is then explained in the Plaintiff's affidavit. The problem occurs when it is discovered that this particular Plaintiff has filed more than fifty of these cases. If believed, this client needed about eighty hours, or ten, eight hour, days, to sign agreements, have questions answered, be helped to understand matters and be kept informed. Again, I don't believe that happened to the extent of 1.6 hours for each of this Plaintiff's fifty cases.

The Defendant postulates that the guiding principle in fixing the reasonable attorney's fee should be the schedule used for awarding attorney's fees in cases where a defendant allows a plaintiff to obtain a default judgment. That position is flawed because everyone in this contest agrees that, though Defendant eventually confessed to a judgment, much more was involved in reaching that point than the mere filing of a complaint, serving a summons and obtaining a judgment as would be expected in a simple default case. The Defendant seems to want to expend attorney's fees in finding a possible defense and, when none is found, pretend that the opposing party ought not to expect to recover fees devoted to countering the Defendant's possible defenses. I don't believe that is how this case should be viewed.

In sum, the parties positions are so wildly disparate and their assertions as to time involved are so lacking in credibility that I am left with many factual difficulties and without any helpful guidance on fixing a reasonable attorney's fee.

#### APPLICABLE LAW

It seems to me that the most favored approach to fixing a reasonable attorney's fee was "born" in *Dixie State Bank v. Bracken*. The four-step analysis set forth in that case is the framework I will apply to reach a decision on the issue.

#### FINDINGS of FACT

What legal work was actually performed?

a - spam research, attributable to this particular case, would likely have taken .2 hour  
b - attorney meetings and case analysis, attributable to this particular case, would likely have taken .5 hour  
c - initial correspondence with Defendant on this case would have taken .3 hour  
d - client meetings and communication, as it relates to this case, should not have exceeded .2 hour  
e - business entity research would have taken .7 hour  
f - drafting complaint and summons in this case should not have exceeded .4 hour  
g - file review in this case should not have exceeded .2 hour  
h - review of confession of judgment - .25 hour  
i - draft affidavit of attorney fees and costs - .6 hour  
j - business entity research by paralegal - 1.9 hours  
k - prepare final summons and complaint by paralegal - .8 hour  
l - database entry and maintenance by paralegal - 1.2 hours  
m - prepare, finalize and file attorney's fee affidavit by paralegal - .6 hour

How much of the work performed was reasonably necessary to prosecute the matter?

There are additional and different hours claimed for work done on this case in the several affidavits filed by Plaintiff. Any of the hours claimed in the affidavits and not noted above were, to my thinking, not necessary for the successful prosecution of this matter.

Is the attorney's billing rate consistent with the rates customarily charged in the locality for similar services?

The Plaintiff's attorneys fix their hourly rate at \$250.00. They assert that their experience and the fact that they regularly charge a similar hourly rate justify such an amount. My observation, after over twenty years of reviewing affidavits for attorney's fees, is that an hourly rate of \$150.00 is much more consistent with the rates charged in this locality by other attorneys for similar services. Thus, the rate charged by these attorneys is not consistent with rates customarily charged for similar services in this locality. An hourly rate of \$150.00 is consistent.

I have no experience with the rates attorneys in this locality charge for the services of their paralegal. The rate of \$85.00 per hour set forth by Plaintiff seems reasonable.

Are there circumstances which require consideration of additional factors? This case, because of the large number of essentially identical cases filed by the same attorneys, became

routine in its nature and posed no significant legal issues at the time this case was filed and brought to conclusion. So much of each of the parties' efforts seem focused on inflation or deflation of the attorney's fee component of this case.

#### CONCLUSION of LAW

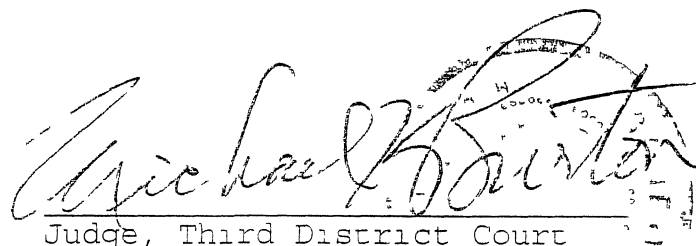
Having found that the Plaintiff's attorney should have spent 3.25 hours at the rate of \$150.00 per hour to successfully prosecute this action; and

Having found that the Plaintiff's paralegal spent 4.5 hours at the rate of \$85.00 per hour to successfully prosecute this action;

I would conclude that Plaintiff is entitled to an award of \$885.00 as a reasonable attorney's fee in this case.

The Plaintiff should now prepare for my signature such order or judgment as he thinks will best effectuate this Decision.

DATED 14 October 2003

  
Judge, Third District Court



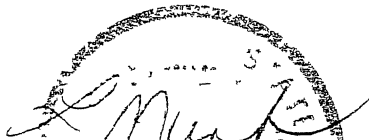
CERTIFICATE OF NOTIFICATION

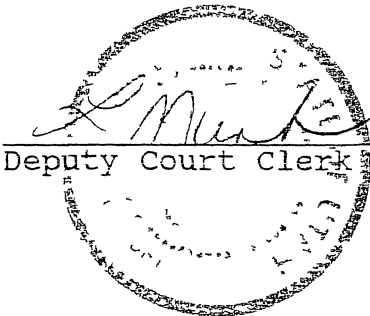
I certify that a copy of the attached document was sent to the following people for case 020413332 by the method and on the date specified.

METHOD NAME

Mail	RANDY L DRYER ATTORNEY DEF 201 SOUTH MAIN, SUITE 1800 SALT LAKE CITY, UT 84145
Mail	JESSE L RIDDLE ATTORNEY PLA P.O. BOX 1187 SANDY UT 84091
Mail	DENVER C SNUFFER ATTORNEY PLA 10885 SOUTH STATE STREET SANDY UT 84047

Dated this 5 day of Oct, 2003.

  
Deputy Court Clerk



#### ADDENDUM 4

Defendant - THE COLUMBIA HOUSE COMPANY  
New York, NY 10020-2200  
Represented by: RANDY L DRYER

Doing Business As - COLUMBIAHOUSECOM  
Represented by: RANDY L DRYER

Defendant - JOHN DOES

#### ACCOUNT SUMMARY

TOTAL REVENUE	Amount Due:	440.00
	Amount Paid:	440.00
	Credit:	0.00
	Balance:	0.00

BAIL/CASH BONDS	Posted:	300.00
	Applied:	0.00
	Forfeited:	0.00
	Balance:	300.00

#### REVENUE DETAIL - TYPE: COMPLAINT 0K-2K

	Amount Due:	45.00
	Amount Paid:	45.00
	Amount Credit:	0.00
	Balance:	0.00

#### REVENUE DETAIL - TYPE: APPEAL

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CASE NUMBER 020413332 Unsolicited Communi.

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	Amount Due:	205.00
	Amount Paid:	205.00
	Amount Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: APPEAL

Amount Due:	190.00
Amount Paid:	190.00
Amount Credit:	0.00
Balance:	0.00

BAIL/CASH BOND DETAIL - TYPE: CASH BOND: Civil, Mi

Posted By:	PARSONS BEHLE & LATIMER
Posted:	300.00
Forfeited:	0.00
Refunded:	0.00
Balance:	300.00

CASE NOTE

PROCEEDINGS

07-25-02 Filed: Motion for Extention of Time to File Attorneys' Fees

Affidavit

11-22-02 Case filed by deem

11-26-02 Judge LINDBERG assigned.

11-27-02 Filed: Complaint 0-2K

11-27-02 Fee Account created      Total Due:      45.00

11-27-02 COMPLAINT 0K-2K      Payment Received:      45.00

Note: Code Description: COMPLAINT 0K-2K

02-24-03 Filed: Answer by ATD Randy L Dryer

COLUMBIA HOUSE HOLDINGS INC

COLUMBIAHOUSECOM

06-20-03 SCHEDULING CONFERENCE scheduled on July 16, 2003 at 09:30 AM in

Second Floor with Judge LINDBERG.

06-20-03 Notice - NOTICE for Case 020413332 ID 5643917

SCHEDULING CONFERENCE is scheduled.

Date: 07/16/2003

Time: 09:30 a.m.

Location: Second Floor

SANDY DISTRICT COURT

210 West 10000 South

SANDY, UT 84070

Before Judge: DENISE P. LINDBERG

This hearing is set as a case management conference to discuss the most effective sequence for scheduling pending motions and moving

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CASE NUMBER 020413332 Unsolicited Communi.

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the cases forward. All lead attorneys for identified spam cases are requested to be present.

07-09-03 Filed: Notice of Confession of Judgment and Motion for Hearing to Determine Reasonable Attorneys' Fees to be Awarded Therein.

07-09-03 Note: RECEIVED: Judgment

07-09-03 Note: File to judge's clerk to set hearing date

07-09-03 SCHEDULING CONFERENCE Cancelled.

Reason: Confession of Judgment filed.

07-14-03 Minute Entry - DEFENDANT'S CONFESSION OF JUDGMENT

Judge: DENISE P. LINDBERG

Clerk: loris

The Defendant's Confession of Judgment is GRANTED. Judgment to enter as reflected in the Confession of Judgment: \$10.00 in statutory damages, \$45.00 in court costs, and reasonable attorneys fees as determined by the court. Plaintiff's counsel to submit an affidavit in support of their attorneys fees request; the court reserves the right to schedule a hearing on the issue as it may deem necessary. The attorneys fee affidavit to be submitted to the court within 10 days.

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Judge DENISE P. LINDBERG

07-14-03 Judgment #1 Entered

Debtor: COLUMBIA HOUSE HOLDINGS INC

Debtor: COLUMBIAHOUSECOM

Debtor: THE COLUMBIA HOUSE COMPANY

Creditor: FRANK AMYX

10.00 Principal

45.00 Costs

55.00 Judgment Grand Total

07-14-03 Filed judgment: Judgment by Confession

Judge dlindber  
Signed July 14, 2003  
07-14-03 Case Disposition is Judgment loris

Disposition Judge is DENISE P. LINDBERG loris

07-25-03 Filed: Motion for Extention of Time to File Attorneys' Fees  
Affidavit  
07-29-03 Filed: Affidavit of Attorneys' Fees and Costs  
08-01-03 Note: File submitted to Judge to review. Wrong case number was  
on paper work correct number was found and resubmitted.  
08-04-03 Filed: Minute Entry Following the Scheduling Conference of July  
16, 2003 (see file)  
08-04-03 Minute Entry - MOTION FOR ATTORNEY FEES  
Judge: DENISE P. LINDBERG  
Clerk: loris  
Set for hearing on the reasonableness of the fees requested.

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CASE NUMBER 020413332 Unsolicited Communi.

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08-05-03 Notice - NOTICE for Case 020413332 ID 5685267  
MOTION HEARING ON ATT FEES is scheduled.

Date: 11/24/2003

Time: 10:00 a.m.

Location: Second Floor

SANDY DISTRICT COURT

210 West 10000 South

SANDY, UT 84070

Before Judge: DENISE P. LINDBERG

08-07-03 Filed: Memorandum (1) Objection to the affidavit of fees and  
costs submitted by plaintiffs counsel (2) Requesting an Order  
approving a fee award of \$150 or, (3) Alternatively requesting  
an evidentiary hrg on the issue of reasonable attorneys fees.

08-13-03 Notice - NOTICE for Case 020413332 ID 5694306  
MOTION HEARING ON ATT FEES.

Date: 09/15/2003

Time: 10:00 a.m.

Location: Second Floor  
SANDY DISTRICT COURT  
210 West 10000 South  
SANDY, UT 84070

Before Judge: DENISE P. LINDBERG  
The reason for the change is Court Ordered  
No tank tops, crop tops, shorts or hats allowed in the courtroom.  
Shoes must be worn.

08-13-03 MOTION HEARING ON ATT FEES scheduled on September 15, 2003 at  
10:00 AM in Second Floor with Judge LINDBERG.  
08-14-03 Filed: Withdrawal of Request for Class Certification  
08-26-03 Filed: Order Striking Class Allegations-unsigned/Pla filed  
Withdrawal of Request for Class Certification  
09-12-03 Filed: Plaintiff's Reply to Defendant's Memorandum Objecting to  
the Affidavit of Fees and Costs Submitted by Plaintiff's  
09-12-03 Filed: AFFIDAVIT OF DENVER C. SNUFFER, JR. FOR ATTORNEYS' FEES.  
09-12-03 Filed: AFFIDAVIT OF ATTORNEYS' FEES OF JESSE RIDDLE.  
09-12-03 Filed: AFFIDAVIT OF ATTORNEYS' FEES OF DANNY FRAZIER.  
09-12-03 Filed: LETTER FROM PARSONS BEHLE & LATIMER.  
09-12-03 Filed: AFFIDAVIT OF PARALEGAL FEES.  
09-12-03 Filed: INDEX OF PLEADINGS.  
09-15-03 Minute Entry - Minutes for MOTION HEARING ON ATT FEES  
Judge: MICHAEL K. BURTON  
Clerk: vickielc  
PRESENT

Plaintiff's Attorney(s): DENVER C SNUFFER  
JESSE L RIDDLE  
Defendant's Attorney(s): RANDY L DRYER  
Audio  
Tape Number: 03-258 Tape Count: 1509

## HEARING

MR. SNUFFER ADDRESSES THE COURT.

MR. DRYER ADDRESSES THE COURT.

MR. RIDDLE ADDRESSES THE COURT.

MR. DRYERS ADDRESSES THE COURT.

THE COURT TAKES THIS MATTER UNDERADVISEMENT.

09-23-03 Filed: Objection to Defendant's Motion Striking Class

Allegations

10-14-03 Filed: Decision (see file)

11-14-03 Filed: Notice of Appeal

11-14-03 Fee Account created      Total Due:      205.00

11-14-03 APPEAL              Payment Received:      205.00

Note: Code Description: APPEAL

11-14-03 Note: File to judge to sign Judgment

11-18-03 Judgment #2 Entered

Debtor: COLUMBIA HOUSE HOLDINGS INC

Creditor: FRANK AMYX

940.00 Total Judgment

940.00 Judgment Grand Total

11-18-03 Filed judgment: Judgment on Pleading

Judge mburton

Signed November 17, 2003

11-19-03 Note: CERTIFIED COPY OF NOTICE OF APPEAL MAILED TO THE UTAH  
SUPREME COURT.

11-26-03 Filed: NOTICE OF CROSS-APPEAL BY RANDY L DRYER, ATD.

11-26-03 Filed: LETTER FROM THE SUPREME COURT THE CASE NUMBER IS  
20030950-SC.

11-28-03 Filed: Notice of Counter-Appeal (Incomplete Payment-should be  
\$205)

11-28-03 Fee Account created      Total Due:      190.00

11-28-03 APPEAL              Payment Received:      190.00

Note: Code Description: APPEAL; Mail Payment;

11-28-03 Bond Account created      Total Due:      300.00

11-28-03 Bond Posted              Payment Received:      300.00

Note: Mail Payment;

12-01-03 Note: CERTIFIED COPY OF NOTICE OF CROSS-APPEAL MAILED TO THE  
SUPREME COURT.

12-16-03 Filed: LETTER FROM THE SUPREME COURT, NOTICE OF CROSS-APPEAL IN  
THIS CASE HAS BEEN FILED. THE CASE NUMBER IS 20030950-SC.

02-04-04 Filed: ORDER FROM THE SUPREME COURT OF UTAH THIS MATTER IS  
TRANSFERRED TO THE COURT OF APPEALS THE CASE NUMBER WILL  
REMAIN

THE SAME.

02-05-04 Filed: LETTER FROM THE UTAH COURT OF APPEALS THE CASE NUMBER



20030950-CA.

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